IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| RAKEEM HARVEY,<br><br>Plaintiff,<br>v.<br><br>GLENN S. GOORD, Commissioner for New York State Department of Correctional Services; DAVID L. MILLER, Superintendent at Eastern Correctional Facility; GARY H. FILION, Superintendent at Coxsackie Correctional Facility; RAELENE MILICEVIC, DR., Eastern Correctional Facility Medical Department Administrator; MICHAEL GUSMAN DR., Eastern Correctional Facility Medical Physician; PAULA. G. OSTERHOUT, Eastern Correctional Facility Medical Department Nurse,<br><br>Defendants. | 9:03CV838<br><br>MEMORANDUM OPINION |

This matter is before the Court on defendants' motion for summary judgment (Filing No. 41). Having carefully reviewed the motion, responses, the briefs of the parties, the evidentiary submissions, plaintiff's 327-page medical record and the applicable law the Court will grant defendants' motion.

## I. PLAINTIFF'S CLAIMS

Plaintiff Rakeem Harvey ("Harvey") brings this action pursuant to 42 U.S.C. § 1983, alleging defendants Glenn S. Goord,

David Miller, Gary Filion, Raelene Milicevic, M.D.[1] ("Dr. Milicevic"), Mikhail Gusman, M.D.[2] ("Dr. Gusman"), and Paula Osterhout ("Nurse Osterhout") violated his constitutional rights when they exhibited deliberate indifference to his medical needs in their treatment of an injury to his left eye, an injury to a finger and in failing to provide prescribed medications. Harvey also asserts a claim of retaliation, asserting that he was transferred out of Eastern Correctional Facility in retaliation for filing a medical grievance.

## II. STANDARD OF REVIEW

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "An issue of fact is 'genuine' if the evidence is such that a reasonable jury could

[1] Dr. Milicevic's name is spelled alternatively in court documents as "Milecivic" and "Milicevic." The Court will use Milicevic because that is the spelling used in Dr. Milicevic's affidavit.

[2] Dr. Gusman's name is shown as "Michael" in the caption; his affidavit shows his first name as "Mikhail."

return a verdict for the nonmoving party.'" *Gayle v. Gonyea*, 313 F.3d 677, 682 (2d Cir. 2002)(*quoting Anderson*, 477 U.S. at 248).

On a motion for summary judgment, all reasonable factual inferences must be drawn in favor of the non-moving party. *See, e.g., Savino v. City of New York*, 331 F.3d 63, 71 (2d Cir. 2003)(*citing Anderson*, 477 U.S. at 255). However, to survive a motion for summary judgment, "the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)(emphasis omitted)(*quoting* Fed. R. Civ. P. 56(e))(citation omitted). "Conclusory allegations, conjecture, and speculation . . . are insufficient to create a genuine issue of fact." *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir. 1998)(citation omitted). Thus, "statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment." *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 452 (2d Cir. 1999)(citations omitted), *cert. denied*, 530 U.S. 1242 (2000). In addition, "the 'mere existence of a scintilla of evidence' supporting the non-movant's case is . . . insufficient to defeat summary judgment." *Niagara Mohawk Power Corp. v. Jones Chem. Inc.*, 315 F.3d 171, 175 (2d Cir. 2003)(*quoting Anderson*, 477 U.S. at 252).

"In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant may satisfy [its] burden by pointing to an absence of evidence to support an essential element of the nonmoving party's claim." *Vann v. City of New York*, 72 F.3d 1040, 1048 (2d Cir. 1995) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). Thus, a party "moving for summary judgment must prevail if the [non-movant] fails to come forward with enough evidence to create a genuine factual issue to be tried with respect to an element essential to its case." *Allen v. Cuomo*, 100 F.3d 253, 258 (2d Cir. 1996)(*citing Anderson*, 477 U.S. at 247-48). While the submissions of pro se litigants are liberally construed, *see, e.g., Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994), the fact that Harvey is "proceeding pro se does not otherwise relieve [him] from the usual requirements of summary judgment." *Fitzpatrick v. New York Cornell Hosp.*, 2002 U.S. Dist. LEXIS 25166, at *5 (S.D.N.Y. Jan.9, 2003)(citing cases).

## III. DISCUSSION

### A. Supervisory Defendants Goord, Miller, Filion and Milicevic

Harvey's claims against defendant Goord are based on Goord's position as Commissioner of the New York State Department of Corrections while his claims against defendants Miller and Filion are based upon their roles as superintendents at the Eastern and Coxsackie Correctional Facilities respectively.

Harvey's claims against Dr. Milicevic are based upon her role as Medical Director at Eastern. To be liable under § 1983, a prison official must have some personal involvement. "Supervisor liability in a § 1983 action depends on a showing of some personal responsibility and cannot rest on respondeat superior. *Hernandez v. Keane*, 341 F.3d 137, 144 (2d Cir. 2003)(citations omitted).

Supervisor liability under § 1983 can be shown by "(1) actual direct participation in the constitutional violation; (2) failure to remedy a wrong after being informed through a report or appeal, (3) creation of a policy or custom that sanctioned conduct amounting to a constitutional violation, or allowing such a policy or custom to continue, (4) grossly negligent supervision of subordinates who committed a violation, or (5) failure to act on information indicating that unconstitutional acts were occurring." *Hernandez*, 341 F.3d at 145. Thus, Harvey must demonstrate the personal involvement of Goord, Miller, Filion and Milicevic in the alleged constitutional violations to maintain his cause of action as to these defendants. *Richardson v. Goord*, 347 F.3d 431, 435 (2d Cir. 2003).

With respect to defendants Goord, Miller and Filion, the plaintiff has not rebutted the affidavits of these three parties. In addition, in his deposition, he testified that each of them were sued simply because they were supervisors and not

because of any personal involvement. *See* Harvey Dep. 138:22-140:3, 141:18-142:11 and 142:12-24. For these reasons, these defendants' motion for summary judgment will be granted.

Harvey also has not produced evidence of personal involvement by Dr. Milicevic. In his deposition, Harvey asserted that he was suing Dr. Milicevic not because of any care she provided or allegedly failed to provide, but instead simply because she was the Medical Director at Eastern (Deposition of Rakeem Harvey ("Harvey Dep."), 144:15-145:11). Harvey testified that he "rarely, if ever" dealt with Dr. Milicevic, and that he did not bring any complaints regarding his medical treatment to her attention (Harvey Dep. 145:5-11). Thus, Harvey's claims against Dr. Milicevic are based solely upon her supervisory role, and her motion for summary judgment will be granted.

**B. Eighth Amendment Violation**

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend VIII. This includes punishments that "involve the unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). In order to establish an Eighth Amendment claim arising out of inadequate medical care, a prisoner must prove "deliberate indifference to [his] serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The standard of deliberate indifference includes both subjective and objective components. "First, the alleged

deprivation must be, in objective terms, 'sufficiently serious.'" *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994)(citations omitted). Second, the defendant "must act with a sufficiently culpable state of mind." *Id.* An official acts with the requisite deliberate indifference when that official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). To establish the subjective component, Harvey must demonstrate that defendants "knew of and disregarded an excessive risk to [his] health or safety." *Farmer*, 511 U.S. at 837. Prison officials are not liable "if they responded reasonably to a known risk, even if the harm ultimately was not averted." *Id.* at 826; *see also Estelle*, 429 U.S. at 106-7 (prisoner not entitled to treatment by every medical alternative as long as treatment is reasonable).

Thus, negligence or medical malpractice is insufficient to support a claim of deliberate indifference. *See Hendricks v. Coughlin*, 942 F.2d 109, 113; *see also Estelle*, 429 U.S. at 105-06. Moreover, mere differences of opinion regarding medical treatment do not give rise to an Eighth Amendment violation. *See Estelle*, 429 U.S. at 107. To the extent Harvey contests the

diagnosis and treatment that he received, he does not state a valid claim of medical mistreatment under the Eighth Amendment.

At issue is whether Harvey's medical conditions are, as a matter of law, sufficiently serious to give rise to an Eighth Amendment claim. To survive a motion for summary judgment, Harvey must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co.*, 475 U.S. at 587 (*quoting* Fed. R. Civ. P. 56(e)). Harvey has alleged that defendants were deliberately indifferent to his well being as evidenced by the treatment afforded to him for his scratched eye and injured finger and delays or interruptions in supplying him with two prescribed medications.

Of course, not all claims regarding improper medical care will be constitutionally cognizable. Eye conditions and injured fingers, like other medical conditions, may be of varying severity. The standard for Eighth Amendment violations contemplates "a condition of urgency" that may result in "degeneration" or "extreme pain." *Hathaway*, 37 F.3d at 66 (*quoting Nance v. Kelly*, 912 F.2d 605, 607 (2d Cir. 1990)(Pratt, J., dissenting)). "A prisoner who nicks himself shaving obviously does not have a constitutional right to cosmetic surgery. But if prison officials deliberately ignore the fact that a prisoner has a five-inch gash on his cheek that is becoming infected, the failure to provide appropriate treatment

might well violate the Eighth Amendment." *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998). Similar distinctions may be drawn with respect to other medical conditions.

1. Eye

Harvey's left eye was injured when he was poked in the eye by another prisoner while playing basketball (Defendants' Statement of Material Facts ("SOF"), ¶ 1; Harvey Dep. 6:14-17). A cornea which has been scratched by a fingernail is considered to be among the most difficult of eye injuries to treat (SOF, ¶ 41; Affidavit of Mikhail Gusman, M.D. ("Gusman Aff."), ¶ 40). While the epithelium, the outer layer of corneal cells, grows back quickly in one to four days, the epithelium can spontaneously come off again in the future, usually prompted by dryness on the surface of the eye (SOF, ¶ 41; Gusman Aff., ¶ 40). Thus the simplest and often most effective treatment are topical eye drops and ointments to keep the epithelium lubricated (SOF, ¶ 41; Gusman Aff., ¶ 40).

The initial injury occurred on November 12, 2000 (SOF, ¶ 1; Harvey Dep. 10:15-11:13; Medical Records of Rakeem Harvey ("MR") 171, 191). Harvey was immediately treated at the prison and examined remotely via a telemed linkup by a physician at the Albany Medical Center ("AMC") in Albany (SOF, ¶ 2; Gusman Aff. ¶ 5; MR 226). Later, Harvey was transported to AMC where he received emergency care for his eye injury (SOF, ¶¶ 4-5; Gusman

Aff. ¶¶ 7-8; MR 170; Affidavit of Rakeem Harvey ("Harvey Aff."), ¶ 4). The next day, after being kept in medical confinement for observation, Harvey was again transported to AMC and was seen by an ophthalmologist who prescribed two medications for the injured eye (SOF, ¶ 6; Gusman Aff. ¶ 9; MR 170, 186, 223).

On November 30, 2000, Harvey re-injured the same eye during a basketball game (SOF, ¶ 7; Harvey Dep. 28:17-29:5; Gusman Aff. ¶ 10; MR 168). Again, Harvey received prompt treatment at the prison, but after Dr. Gusman examined him and determined that he should be immediately transported to the AMC emergency room, Harvey refused (SOF, ¶ 7; Harvey Dep. 29:8-31:4; Gusman Aff. ¶ 10; MR 168, 216, 221). The next day, at the urging of Dr. Gusman, Harvey consented to being transported to the AMC emergency room where he was prescribed Tylenol 3 for pain and ordered to take Ocuflox and Cyclogel (SOF, ¶ 8; Gusman Aff. ¶ 11; MR 188). Harvey was instructed to return to AMC for an ophthalmology consultation the next day, but, after Dr. Gusman had made all of the arrangements, Harvey refused to go and his consultation at AMC was cancelled (SOF, ¶¶ 8-9; Gusman Aff. ¶ 12; MR 167, 209, 218). Harvey signed a Refusal of Medical Examination Form stating, "I am refusing a medical trip because I have receiving (sic) the necessary medication to provide healing." (SOF, ¶ 9; Gusman Aff. ¶ 12; MR 209).

Harvey's medical records reflect that, over the next year and a half, he complained five times of eye pain (SOF, ¶¶ 17, 21, 23-24, 30; MR 85, 154-55, 161-62). Each time he was examined by a doctor and/or a nurse and no evidence of cuts, abrasions or infections were ever noted. Once, on January 22, 2001, Harvey sought a follow-up examination of his eye, but a week later, on the day of the scheduled examination, Harvey refused to keep the appointment, noting that he had no complications regarding his eye in the past 168 hours (SOF, ¶ 18; Gusman Aff. ¶¶ 20-21; MR 162, 210; Harvey Aff. ¶ 10).

Four times between November, 2000, and April, 2002, Harvey was scheduled for an outside consultation regarding his eye (SOF, ¶¶ 9, 14, 19, 29; MR 84-85, 166-67, 188, 209). Twice Harvey refused to go through with the consultation, and the two times he underwent the consultation, the examining physician found that the abrasion was resolved or that there was no sign of abrasion (SOF, ¶¶ 9, 14, 19, 29; Harvey Aff. ¶ 5; MR 84-85, 167-68, 188, 209).

On May 17, 2002, Harvey was seen for a corneal consultation by a Dr. Patel who prescribed Muro eye drops and ointment and recommended follow up in four months (SOF, ¶ 31; Gusman Aff. ¶ 34; MR 84). Before the Muro prescription arrived, Harvey was transferred to Oneida from Eastern (SOF, ¶ 33; Gusman Aff. ¶ 36). Apparently the prescription was delayed in getting

to Harvey because he complained that he had not received it as of June 24, 2002 (SOF, ¶ 36; Affidavit of Dr. Milicevic ("Milicevic Aff.") ¶ 40; MR 31). The prescription arrived soon thereafter because on June 30, 2002, Harvey reported to emergency sick call at Oneida, complaining that his symptoms were worsened by the Muro (SOF, ¶ 37; Milicevic Aff. ¶ 41; MR 31, 81). Dr. Alpert discontinued the Muro and replaced it with Erythromycin ointment (SOF, ¶ 37; Milicevic Aff. ¶ 41; MR 81).

The record reflects that each time Harvey complained about his eye, he was examined and treated. Not only was Harvey seen by nurses and physicians at the prison, but he was also seen several times by outside specialists, and several other times had appointments scheduled for outside consultations with specialists that Harvey refused to keep. Harvey stated that his eye condition was adequately managed while at Eastern through the use of prescription drops and ointments (SOF, ¶ 42; Harvey Dep. 120:7-17). While Harvey asserts that one outside physician suggested that he could resolve Harvey's eye problem through one of three possible procedures (Harvey Dep. 133:4-138:11, MR 75), two of the three recommendations had been tried to no avail (Harvey Dep. 133:11-135:25). The third option, laser surgery, is not considered to be a viable option by other ophthalmologists (Harvey Dep. 137:21-138:17). Thus, the medical record does not establish that the defendants acted with the requisite deliberate

indifference to Harvey's medical needs regarding his eye condition.

Harvey cannot establish either the objective or subjective components, both of which are necessary to establish an Eighth Amendment claim. He fails to establish the objective component because where he was cared for continuously for his condition, he cannot show the requisite serious deprivation that would violate contemporary standards of decency. *Hathaway*, 37 F.3d at 66. He also cannot demonstrate the required subjective component which necessitates a showing that the prison officials acted with a sufficiently culpable state of mind where his only real complaint has to do with a single alternative treatment which most ophthalmologists do not consider to be a viable option. *Id.* A difference of opinion as to a course of medical treatment is not evidence of a culpable state of mind. *Estelle*, 429 U.S. at 107. Therefore, defendants' motion for summary judgment as to the claims related to Harvey's eye injury and treatment will be granted.

2. Finger

Harvey injured his right index finger on May 16, 2002. He appeared at emergency sick call that day with a finger that was swollen but with the skin unbroken (SOF, ¶ 44; MR 135). A nurse x-rayed the finger and applied ice (SOF, ¶ 44; MR 62, 135). The x-ray showed the finger was not broken or dislocated (MR 62).

Harvey had Motrin in his cell which he took to control the pain (SOF, ¶ 44; MR 135). The next day, Friday, May 17, 2002, Harvey requested and received an ice pack and painkillers for his finger while at Coxsackie Regional Medical Unit for a previously scheduled ophthalmology consultation (SOF, ¶ 45; Harvey Dep. 72:24-74:18). Harvey asserts that later that day, at the 8:00 p.m. medication call after returning from Coxsackie, he sought ice packs and brought an empty prescription bottle of Motrin to be refilled (Harvey Dep. 78:9-80:17). He expected the prescription would be refilled and available for him on the following Monday (Harvey Dep. 80:14-17).

On May 18 and the morning of May 19, 2002, he sought painkillers and ice packs at each medication run but was refused by Nurse Osterhout (SOF, ¶ 45; Harvey Aff. ¶ 19). Harvey returned on May 19, 2002, for the noon and 4:00 p.m. medication runs, but upon seeing Nurse Osterhout, he just left, never even asking for ice or painkillers (Harvey Dep. 89:14-22). At the 8:00 p.m. medication run, Harvey was served by Nurse Jennings, who opined that the finger was infected and then lanced, cleaned and bandaged the finger (SOF, ¶ 45; Harvey Dep. 90:1-92:19; MR 36). Nurse Jennings also provided Harvey with a course of antibiotics to be taken for 5-7 days (SOF, ¶ 45; Harvey Dep. 91:18-92:12; MR 36). Harvey returned to have his finger soaked in iodine and re-bandaged daily for approximately five days

(Harvey Dep. 93:20-22; MR 35). On June 4, 2002, the finger was described as "healing well" (MR 32).

Harvey's claim as to his finger thus centers on the alleged denial of ice and painkillers on Saturday and prior to 8:00 p.m. on Sunday. He does not contest the quality of care he received from Nurse Jennings on May 19, 2002, and he admits that he did not expect to have his Motrin prescription filled until the following Monday (Harvey Dep. 80:14-17).

"Where the prisoner is receiving appropriate on-going treatment for his condition but, instead brings a narrower denial of medical care claim based on a temporary delay or interruption in treatment, the serious medical need inquiry can properly take into account the severity of the temporary deprivation alleged by the prisoner." *Smith v. Carpenter*, 316 F.3d 178, 186 (2d Cir. 2003). "Because society does not expect that prisoners will have unqualified access to health care," a prisoner must first make this threshold showing of serious illness or injury in order to state an Eighth Amendment claim for denial of medical care. *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). The term "sufficiently serious" has been defined as "a condition of urgency, one that may produce death, degeneration, or extreme pain." *Hathaway*, 99 F.3d at 553.

Other courts in this circuit have found more severe injuries did not pose a substantial risk of serious harm. It has

been held that the objective prong of the deliberate indifference test is not satisfied even where a finger is broken. *Henderson v. Doe*, 1999 U.S. Dist. LEXIS 8672, at *2 (S.D.N.Y. June 10, 1999)(that a broken finger was not "sufficiently serious" because it does not produce death, degeneration or extreme pain); *Rivera v. SB Johnson*, 1996 U.S. Dist. LEXIS 14192, at *6-7 (W.D.N.Y. Sept. 25, 1996)(a broken finger, without more, simply does not present a condition of urgency which correspondingly merits constitutional protection); *Sonds v. St. Barnabas Hosp.*, 151 F. Supp. 2d 303, 311 (S.D.N.Y. 2001)(a cut finger, even where skin is "ripped off" is not a sufficiently serious injury to justify civil rights relief). Here, the Court finds that the temporary break in treatment for his injured finger of less than 48 hours is insufficient to meet the threshold showing of serious injury or illness necessary to state an Eighth Amendment claim. Harvey's deliberate indifference claim based upon the treatment he received for his injured finger will be dismissed.

3. Delay in receipt of Medications - Atarax and Muro

a. Atarax

From September to December, 2001, Harvey was taking Atarax following a wrist fracture (SOF, ¶ 46; MR 155). Harvey was prescribed Atarax for the itching caused by the cast (MR 155). The cast was removed on September 28, 2001 (MR 68). On December 5 and 12, 2001, Nurse Osterhout wrote notes on his chart

questioning whether the Atarax should be discontinued since his cast had been removed (SOF, ¶ 46; MR 151-52). Dr. Gusman agreed, noting that since Harvey's cast had been removed, there was no further source of itching for which Atarax was indicated (SOF, ¶ 46; MR 151). Harvey contends that Nurse Osterhout inappropriately interfered with his receipt of this medication.

Harvey is mistaken. Nurse Osterhout did not discontinue the Atarax unilaterally. The record reflects that she simply questioned Dr. Gusman about the propriety of the prescription in light of the fact that the reason the Atarax had been prescribed was no longer applicable because the cast had been removed. The Court finds that Nurse Osterhout's actions do not give rise to a constitutional claim.

b. Muro

Harvey's own complaint demonstrates that he was not injured by the delay in his receipt of the Muro eye medication because he states that "upon using the medication, it had an adverse effect." (Complaint, ¶ 29; Harvey Dep. 152:16-23). As the Muro did not help Harvey's condition, the delay in receiving the Muro cannot be a basis for a constitutional claim.

**C. Transfer Claim**

The United States Supreme Court has held that the transfer of an inmate from one correctional facility to another does not implicate a liberty interest, even when the transfer

resulted in the inmate's loss of "access to vocational, educational, recreational and rehabilitative programs." *Hewitt v. Helms*, 459 U.S. 460, 467 (1983). Harvey was transferred from a maximum security prison to a medium security prison because he had been reclassified as a medium security risk. Because the transfer of an inmate from one facility to another does not implicate a liberty interest, Harvey's transfer to Oneida does not violate his rights under the Eighth Amendment to be free from cruel and unusual punishment. Therefore, this claim will be dismissed.

A separate order will be entered in accordance with this memorandum opinion.

DATED this 18th day of December, 2006.

BY THE COURT:

/s/ Lyle E. Strom

LYLE E. STROM, Senior Judge
United States District Court